

## **Two Responses to Defendant's Motion to Retroactively Apply the Self-Defense Statute**

On April 24, 2006, the Governor Napolitano signed into law Senate Bill 1145, amending Arizona's justification statutes. The law signed by the Governor contains an emergency provision. The emergency provision results in the law going into effect on the date of signing, April 24, 2006. *Clark v. Boyce*, 20 Ariz. 544, 547, 185 P. 136, 137 (1919) ("Emergency laws when passed according to the forms prescribed by the Constitution, become effective at once and prevent a referendum."). Generally, statutes and their amendments take effect on date of enactment or on their effective dates; unless legislative intent is to the contrary, statutes apply only prospectively. [Merchants Despatch Transp. Corp. v. Arizona State Tax Commission \(App. Div.1 1973\) 20 Ariz.App. 276, 512 P.2d 39](#). The new law applies only to crimes committed on or after 12:01 a.m. on April 24, 2006. *In re Shane B.*, 198 Ariz. 85, 87, 7 P.3d 94, 96 (2000) ("Courts look to the date of the offense, rather than the date of adjudication, to determine retroactivity of application."). Defendants should not get the benefit of the recent amendments if their criminal conduct occurred before April 24, 2006.

Defendant asserts that the new law should apply retroactively. However, there is little legal authority to support Defendant's position. Arizona Revised Statute § 1-244 states, "No statute is retroactive unless expressly declared therein." A statute has prospective operation only, unless the statute plainly indicates an intent that it have retrospective effect. [Rodriguez v. Terry \(1955\) 79 Ariz. 348, 290 P.2d 248](#); [Cummings v. Rosenberg \(1900\) 12 Ariz. 327, 100 P. 810](#). Unless a statute expressly applies retroactively, it presumptively applies prospectively. [State v. Fell \(App. Div.2 2004\) 209 Ariz. 77, 97 P.3d 902](#), review granted, affirmed [210 Ariz. 554, 115 P.3d 594](#). Legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events. [San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa \(1999\) 193 Ariz. 195, 972 P.2d 179](#).

The Arizona appellate courts have expressly held that any "substantive" change to a statute does not apply retroactively. *State v. Fell*, 210 Ariz. 554 at 560, ¶¶ 22-23, 115

P.3d 594 at 600 (2005). The changes to the justification statutes are substantive because they expand the range of conduct falling within the definition of justification. The Court cannot create an exception to the Legislature's exclusive authority to determine when and whether a statute will apply retroactively.

Defendant relies on one civil case, *Pima County v. Pima County Law Enforcement Merit System Council*, 211 Ariz. 224, ¶15, 119 P.3d 1027, 1031 (2005), to support his claim that the new amendments are “procedural” in nature, and therefore apply retroactively. However, in the criminal context, the legal authority, as cited by Defendant, is overwhelmingly to the contrary. See *State v. Fletcher*, 149 Ariz. 187, 192, 717 P.2d 866, 871 (1986) (increasing burden of proof on defendant for insanity defense is substantive in nature); *State v. Coconino County Superior Court*, 139 Ariz. 422, 678 P.2d 1386 (1984) (change in quantum of proof necessary to sustain conviction is not retroactive); *State v. Gilfillan*, 196 Ariz. 396, 998 P.2d 1069 (App. 2000) (new rape shield statute placing burden of proof on defendant by clear and convincing evidence is substantive, not procedural and does not violate separation of powers). Likewise, the recent amendments to the justification statutes involve substantive changes in the quantum of proof. Substantive changes are not retroactive and the Legislature expressed no intent that the new amendments should apply retroactively.

The State of Arizona, by and through undersigned counsel, moves this Court to affirm its prior ruling that the recent amendments to the justification statutes are not retroactive and do not apply to the current case.

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**The amendments to the Arizona justification statutes signed into law on April 24, 2006 do not apply retroactively to offenses committed before the April 24, 2006, effective date of those amendments.**

On \_\_\_\_\_, when the defendant committed the offenses with which he is charged, A.R.S. § 13-103 read as follows:

### **§ 13-103. Abolition of common law offenses and affirmative defenses; definition**

**A.** All common law offenses and affirmative defenses are abolished. No conduct or omission constitutes an offense or an affirmative defense under this title or under another statute or ordinance.

**B.** For the purposes of this section, “affirmative defense” means a defense that is offered and that attempts to justify the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable. Affirmative defense does not include any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.

In addition, when the defendant committed the offenses with which he is charged, A.R.S. § 13-205 read as follows:

### **§ 13-205. Affirmative defenses; burden of proof**

**A.** Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title.

**B.** This section does not affect the presumption contained in § 13-411, subsection C<sup>1</sup> and § 13-503.<sup>2</sup>

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<sup>1</sup> § 13-411 was entitled “Justification: use of force in crime prevention.” § 13-411(C)(provision stated, “A person is presumed to be acting reasonably for the purposes of this section if he is acting to prevent the commission of” any of the offenses listed in” § 13-411(A), including aggravated assault causing serious physical injury or using a deadly weapon or dangerous instrument.

<sup>2</sup> That section provides that temporary intoxication resulting from voluntary ingestion of any substance “does not constitute insanity and is not a defense for any criminal act or requisite state of mind.”

In other words, at the time the defendant committed the offenses in this case, self-defense was an affirmative defense in Arizona, meaning that a defendant bore the burden of proving self-defense by a preponderance of the evidence.

However, on April 24, 2006, the Arizona Governor signed into law Senate Bill 1145, amending Arizona's justification/self-defense statutes. The bill contained an emergency clause under Article 4, Part 1, § 1(C) of the Arizona Constitution<sup>3</sup>, meaning that it became effective on the day it was signed. *Clark v. Boyce*, 20 Ariz. 544, 547, 185 P. 136, 137 (1919) ["Emergency laws when passed according to the forms prescribed by the Constitution, become effective at once and prevent a referendum."]

As of April 24, 2006, the amended version A.R.S. § 13-103 reads as follows:

**§ 13-103. Abolition of common law offenses and affirmative defenses; definition**

**A.** All common law offenses and affirmative defenses are abolished. No conduct or omission constitutes an offense or an affirmative defense unless it is an offense or an affirmative defense under this title or under another statute or ordinance.

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<sup>3</sup>That constitutional provision states that, to allow for initiative petitions to be filed, legislative acts are not operative for ninety days after the legislative session closes, unless the act "state[s] in a separate section why it is necessary that it shall become immediately operative" and is approved by a two-thirds vote of each House and approved by the Governor. The bill amending the statutes in this case complied with that constitutional provision and was thus effective when the Governor signed it.

**B.** For the purposes of this section, "affirmative defense" means a defense that is offered and that attempts to excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable. *Affirmative defense does not include any justification defense pursuant to chapter 4 of this title or any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.*

[Emphasis added.].

Further, A.R.S. § 13-205 now reads:

**§ 13-205. Affirmative defenses; burden of proof**

A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence. Justification defenses under chapter 4 of this title are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. *If evidence of justification pursuant to chapter 4 of this title is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.*

B. This section does not affect the presumption contained in § 13-411, subsection C and § 13-503.

[Emphasis added.].

Under the amended statutes, justification defenses under Title 13, Chapter 4 are no longer affirmative defenses. Accordingly, under the statutes as they now read, if a defendant presents sufficient evidence to raise the issue of self-defense or any other defense that would justify his conduct and make it non-criminal, the burden shifts to the State to prove beyond a reasonable doubt that the defendant's acts *were not* justified.

The new law applies only to crimes committed on or after 12:01 a.m. on April 24, 2006. “Absent express language, Arizona statutes are not retroactive. A.R.S. § 1-244<sup>4</sup> (1995).” *State v. Stine*, 84 Ariz. 1, 2, 906 P.2d 58, 59 (App. 1995). That is, unless a statute specifically provides otherwise, it will not govern events that occurred before its effective date. *State v. Gonzales*, 141 Ariz. 512, 513, 687 P.2d 1267, 1268 (1984). “Courts look to the date of the offense, rather than the date of adjudication, to determine retroactivity of application.” *In re Shane B.*, 198 Ariz. 85, 87, 7 P.3d 94, 96 (2000); *see also Baker v. Superior Court*, 190 Ariz. 336, 947 P.2d 910 (App. 1997).

In this case, the defendant’s crimes were committed on \_\_\_\_\_, well before April 24, 2006, the date on which the statutory amendments took effect. Because the defendant’s criminal conduct occurred long before the effective date of the amended statute, the defendant should not get the benefit of the burden of proof change provided by the new law solely because his trial is scheduled after April 24, 2006.

Allowing a contrary result would violate the doctrine of equal protection. Hypothetically, consider two defendants, Jones and Smith, who committed the same kind of aggravated assault on the same date, before the effective date of the amended statutes in this case. Both defendants

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<sup>4</sup> That statute provides: “No statute is retroactive unless expressly declared therein.”

should be subject to the same burden of proof. If the Respondent Judge's ruling were correct, that the application of the statute depends on the date of trial, the two defendants could be treated differently under the law. Suppose Jones went to trial quickly, before the effective date of the amended statutes, and bore the burden of proving by a preponderance of the evidence that he acted in self-defense or with some other justification. Now suppose that Smith's trial is delayed, for any reason, until after the effective date of the new statutes. Smith now has the benefit of the amended statutes; thus, once he has presented evidence of self-defense, the State bears the burden of proving beyond a reasonable doubt that Smith did not act in self-defense. The result is that the two defendants who committed the same crime on the same day are treated differently depending on when their trial happens to be held.

In Arizona, the State may treat different persons in different ways without violating equal protection if the classification is reasonable and is supported by a rational and legitimate state interest. *State v. Seip*, 128 Ariz. 56, 58, 623 P.2d 845, 847 (App. 1980). There is no legitimate state interest in treating Smith and Jones differently depending on when their individual trials are held.

An intermediate appellate court in Florida has recently considered a case strikingly similar to this one, involving an amended statute similar to

Arizona's, and held that the amendment did not apply retroactively. *State v. Smiley*, 2006 WL 929885 (Fla. District Court of Appeal, April 12, 2006). In that case, Florida expanded its right to self-defense by enacting an amended statute, effective October 1, 2005. The new statute eliminated the "duty to retreat" before using deadly force that previously applied under Florida common law. Smiley was accused of first degree murder committed on November 6, 2004, before the effective date of the amended statutes. He moved the trial court to instruct the jury under the new statutes and the trial court granted that motion. The trial court reasoned that the statute was remedial and, therefore, held that it should apply retroactively.

The State sought the equivalent of special action review in Arizona by petitioning the Florida Court of Appeals for certiorari. That Court found that it had jurisdiction, "as the order permitting this expanded self-defense instruction is highly prejudicial to the state's presentation of its case and would evade review should Smiley be acquitted at a trial where this instruction is given." 2005 WL at \_\_\_\_.<sup>5</sup>

The Florida Court then granted relief to the State, holding that the amended statute could not be applied to crimes committed before its effective date. The Court reasoned that the Florida legislature did not

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<sup>5</sup> Page numbers are not currently available for this document on Westlaw.



indicate any intent to have the statutory change apply retroactively.<sup>6</sup>

Smiley argued that the statute should apply retroactively because it was remedial, in that it provided for a greater right of self-defense than previously existed in Florida. The Florida Court disagreed, stating that the statute “created a new right not existing before the statute’s passage. Thus, it is not remedial in the sense that it may be applied retroactively to events occurring prior to its enactment.” *Id.* at \_\_\_\_\_. The Florida Court held that Smiley was not entitled to jury instructions based on the expanded right of self-defense provided for in the amended statutes.

The State submits that this Court should reach the same conclusion the Florida Court of Appeals reached in *Smiley, supra*. The amended statutes contain no provision stating that they are intended to apply retroactively, and applying the amended statutes would violate equal protection, as argued above. Therefore, the State asks this Court to accept jurisdiction, grant relief, and issue an Opinion for the guidance of the Arizona legal community.

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<sup>6</sup> The Florida Court also noted that a Florida constitutional provision specifically stated, “Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.” Florida Constitution, Art. X, § 9. The Arizona Constitution contains no similar provision, but Art. 2, Section 25 of the Arizona Constitution states, “No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted,” and, as noted above, A.R.S. § 1-244 states, “No statute is retroactive unless expressly declared therein.”

